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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

COPPER HARBOR COMPANY, INC., Plaintiff and Respondent, v. CENTRAL GARDEN & PET COMPANY, Defendant and Appellant.	A149709; A150381 (Contra Costa County Super. Ct. No. C-13-01158)

Copper Harbor Company, Inc. (Copper Harbor) designed a manufacturing process that uses a continuous stirred tank reactor (CSTR)[1] and other processes to turn a pectin-based syrup into a jelly. It developed this process under contract with Central Garden & Pet Company (Central Garden) to help manufacture Central Garden's "ant stakes"—small plastic capsules containing an insecticide suspended in a jelly mixture. When Central Garden created its own automated process to manufacture its ant stakes, Copper Harbor sued Central Garden for trade secret misappropriation, unfair competition, breach of contract, and unjust enrichment. A jury found Central Garden liable to Copper Harbor for $300,000 in actual damages and $1,718,694 under an unjust enrichment measure of damages.

[1] A CSTR is a reactor in which the chemical reactants are pumped continuously into a tank at the same rate the product is removed, and therefore, is operated at a steady state and assumed to be perfectly mixed.

In this consolidated appeal from the judgment and various post-judgment orders, Central Garden contends the evidence was insufficient to support the jury's finding of a "combination" trade secret comprised of the CSTR and other components because the non-CSTR components were generally known to the public and did not provide any added value to the combination. Central Garden further argues a new trial was warranted because the jury's special verdict contained fatally inconsistent and duplicative awards. Finally, Central Garden argues the trial court committed reversible error by allowing Copper Harbor to present speculative and unreasoned expert testimony on damages and by refusing to apply a contractual damages limitation. We reject these arguments and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Central Garden has manufactured and sold ant stakes for more than 80 years. Until 2011, Central Garden produced the ant stakes through its subsidiary, Grant Laboratories (Grant or Grant's).

A. Central Garden's Prior Manufacturing Process

The ant stake manufacturing process can generally be divided into four stages: (1) cooking; (2) mixing; (3) filling; and (4) packaging. Prior to 2010, Central Garden's employees performed the cooking and mixing stages at the company's facility in San Leandro.

During the cooking stage, workers carried and poured 80-to-100-pound bags of sugar, pectin and other ingredients into a vat where they were mixed and heated for several hours to make the syrup. In the mixing stage, a gelling agent—citric acid—was added to the syrup, turning it into a jelly. Thereafter, the workers removed buckets of the hot jelly from the mixing tank and poured them onto tables lined with parchment paper. Once the jelly set, it was cut into small cubes, and the parchment sheets of cubes were stacked into crates and stored for transport. A third-party packager, Peerson Packing (Peerson), picked up the crates and transported them to its own facility in Stockton, where dozens of Peerson workers performed the filling and packaging stages by inserting the jelly cubes into the plastic stakes and placing the stakes into consumer packages.

Because this process was time- and labor-intensive, Central Garden had to manufacture the stakes year-round, building up significant inventory at substantial cost.

B. Proposed Automation of the Manufacturing Process

In or around 2005, Central Garden considered automating its ant stake manufacturing process in order to cut labor costs, reduce waste, and improve worker safety, product consistency, and quality. Central Garden initially considered a proposal submitted by ZYI Corp./Chocotech (Chocotech). This proposal contemplated using a static mixer, which is a mixing device that does not have moving parts and mixes fluids by pushing them through a baffled tube, creating a turbulent flow. Central Garden did not proceed with the Chocotech proposal because Central Garden "was managing its cash and not investing in large projects like this and [its executives] didn't believe that the return was adequate."

In 2009, Central Garden again considered automating its manufacturing process and sought help from Walt Johnson, an operations and efficiency expert. Johnson prepared a 2010 sensitivity analysis of the costs and benefits of Central Garden making the stakes itself or outsourcing the manufacturing process to a third party. As part of his analysis, Johnson found that a 5 percent growth rate for future sales in 2010 to 2015 was "most likely."

Between 2005 and 2010, Central Garden received design proposals from several different engineering companies. None of these proposals contemplated using a CSTR.

C. Collaboration with Copper Harbor

Meanwhile, Central Garden was approached in or around March 2009 by Copper Harbor, a contract chemical manufacturing and packaging company founded by chemical engineer Dan Walters, for a potential business opportunity to improve Central Garden's ant stake products. The two companies explored the possibility of Copper Harbor providing filling and packaging services at lower cost and higher quality than Peerson.

To facilitate the sharing of information and the protection of confidential information exchanged during the ant stake project, the companies entered into a mutual Non-Disclosure and Confidentiality Agreement (NDA) on May 7, 2009. Central

Garden's confectionary expert, Terry Richardson, provided Copper Harbor with guidance about the characteristics of the ant stake jelly and information on temperature and pH targets under certain conditions. Copper Harbor used Richardson's guidance as a starting point but eventually developed different parameters.

Copper Harbor regularly reported its progress to Central Garden and shared information such as design diagrams and how variables such as temperature were impacted by the types of equipment it was using. Videos sent to Central Garden were marked "Confidential."

By October 2009, Copper Harbor had developed a working automated ant stake line, which consisted of taking the pre-cooked syrup supplied by Central Garden, heating it, and transferring it to a CSTR for mixing. Specific process improvements were implemented:

Low-shear mixing

Low-shear mixing involves mixing the syrup slowly and "pushing it around, rather than whipping it." Copper Harbor used low-shear mixing by attaching a U-shaped impeller to a variable drive drill and mixing at a speed of 350 RPMs.

pH control

The amount of citric acid mixed into the syrup in the CSTR was controlled by a pH probe. The probe monitored the pH level of the mixture and automatically added citric acid when necessary to keep the pH level of the syrup/acid mixture within a defined range.

Temperature profile

Copper Harbor designated a temperature range of 165 to 185 degrees Fahrenheit, with a target temperature of 175 degrees. Copper Harbor learned, through testing, that this temperature range would prevent the syrup from gelling too quickly.

Filling and packaging

Copper Harbor filled the ant stakes using positive displacement pumps, which dosed a specified amount of jelly into each plastic stake through non-diving nozzles. Each ant stake was filled with liquid jelly, cooled on a conveying table, and then dropped

into an accumulation bin. Copper Harbor employees would then pack the filled ant stakes into cartons and cases.

Central Garden was pleased by the automated ant stake line developed by Copper Harbor. Richardson told Copper Harbor the jelly it produced using the new temperature and pH parameters was superior to the one generated by Grant. In February 2010, Central Garden's Vice President of Marketing, Chuck Yeager, forwarded a video of Copper Harbor's process with the message: "Liquid fill Ant Baits. It WORKS." In a June 2010 email to Yeager, Walters noted that Richardson was "shocked that we mastered the process so well. On a 1-5 scale, with current Grant cube jelly quality being a 3, we are consistently a 3+ to 4 on production."

In total, Copper Harbor spent approximately $140,000 on labor and materials to develop its ant stake line.

D. The Packaging Agreement

On or about January 28, 2011, the parties entered into a Packaging Agreement for Copper Harbor to make the jelly-filled stakes. Under the agreement, Central Garden would deliver to Copper Harbor the "Company Materials" (defined as the ant stakes and pods; boxes and cartons; jelly syrup in 55 gallon drums without citric acid added; dry citric acid; stakes and all packaging materials necessary to produce finished goods), and Copper Harbor agreed to package the products in conformity with Central Garden's specifications. The agreement was for a one-year term.

Paragraph 7(b) contained a provision limiting Central Garden's liability for damages to Copper Harbor. It stated in relevant part: "In no event will [Central Garden] . . . be liable or otherwise responsible for any incidental, indirect, special, consequential or punitive damages or losses (including without limitation lost profits, loss of opportunity, or capital costs) incurred by or threatened against [Copper Harbor], regardless of legal theory, even if [Central Garden] was advised of the possibility of such damages or losses. In no event will the total liability of [Central Garden] . . . for actual damages arising from this agreement exceed the fees paid by [Central Garden] to [Copper

Harbor] under this agreement during the twelve (12) month period preceding the event or condition upon which the claim is based."

Paragraph 11(b), added by Walters/Copper Harbor, stated in relevant part: "Any and all improvements and/or modifications to the manufacturing process remains the property of [Copper Harbor] . . . . Additionally, [Central Garden] agrees that the process developed by [Copper Harbor] is valuable and remains the sole property of [Copper Harbor] and is continuously protected . . . by a separate confidentiality agreement."

E. Central Garden's Relocation to Dallas

Around the same time the parties entered into the Packaging Agreement, Central Garden began the process of relocating its stake manufacturing process to a facility in Dallas, Texas. On February 1, 2011, Central Garden prepared a Capital Authorization Request (CAPEX) seeking approximately $2 million to build the automated stake line. Central Garden's engineers tasked with completing the automation project were concerned about proceeding with such an expensive project until they understood the filling process and therefore wanted to visit Copper Harbor's facility to learn more. In February 2011, a Central Garden engineer wrote to Roy Brown, Central Garden's Director of Engineering, expressing concern that a planned trip to Copper Harbor had been delayed. "Unfortunately, the main purpose of our visit to SF was to go to Copper Harbor. I think we would feel a lot more comfortable with the filling process if we see it prior to our Capital submittal. Just personally speaking, I think our need to see and understand the process right now is more important and if it arouses suspicion then that is something Central needs to be prepared to deal with." Brown responded, "I share those concerns . . . . [T]he cooking and filling processes are the other two big question marks that pose a high risk to our success."

Brown visited Copper Harbor on February 16, 2011. During this visit, Walters explained to Brown the basics of how the CSTR works and why it was important to the success of the process. Walters also discussed pH control and described how it works. In his trip report, Brown detailed his observations about Copper Harbor's process, including that "[t]he syrup and citric acid are metered together in a small ~1 gal. pot that includes a

mixer and pH probe." Brown later emailed Jeanne Parker, Central Garden's chemical engineer, stating, "CSTR is the term that Copper Harbor used for their [citric acid] addition system. [¶] . . . It's on Wikipedia," and provided her with a link to the information on CSTR.

On February 22, 2011, Central Garden's efficiency expert, Johnson, submitted the CAPEX request. That same day, he wrote to an equipment supplier to abandon their plan for a static mixer, stating, "we now think that the static mixer for jelly and citric acid may not be the best choice. Mixing can be better managed by using a small 1 gallon mix tank where jelly is added to maintain level and acid is added to maintain pH."

Once the CAPEX was approved, Central Garden's engineers had a deadline of October 2011 to set up the automated process in Dallas in order to meet seasonal demand. Central Garden's engineers expressed their desire to return to Copper Harbor. In a March 22, 2011 email to Brown and Johnson, Parker indicated that she wanted to study the citric acid addition at Copper Harbor and "glean as much information from the engineer there as possible i.e. pH probe, flow rates, temperatures, critical factors etc." On March 31, 2011, Brown wrote to Central Garden's general counsel regarding his interest "in gaining access to Dan Walters' . . . knowledge of 'in line citric acid addition' (when he kept referring to his 'CSTR', he was talking about the in line addition of citric acid) for use in our Grant's automation system here in Dallas. . . . Jeanne Parker (copied) is also a Chemical Engineer (like Dan) and is going to be working on that part of the process among others for us. She has a very keen interest in picking his brain." "All the components that Dan uses are off-the-shelf items. We can figure it out given time, but if we could use his know-how of how it is put together and learn from his experience putting it together (I.e.: failures and finally success) and making it work – that will take a load off the project."

In April 2011, Parker and Brown visited Copper Harbor. In her trip report, Parker wrote: "The purpose of the trip to Copper Ha[r]bor was to view the current dosing process in production for Grant's Ant Stakes and visit with Dan Walters (Owner and Chemical Engineer) to gleen [sic] from his experience creating the dosing system."

"Challenges and overcome obstacles are many in this process. [¶] . . . [¶] . . . The selection of pH probe is very important to achieve the necessary response time. Several different models were tried before the current probe was selected. [¶] . . . [¶] . . . It has been a concern that after the addition of the citric acid the syrup will set in the fill lines and small stirred tank (CSTR) in a short period of time. From the experience at Copper Harbor, as long as this syrup is held at ~185° it will not gel."

Brown detailed his own observations in a report, noting that Walters "was forthcoming and shared with us many details of his experience with the jelly and his successes and failures with it. [¶] . . . Dan's experience with the jelly and the equipment he has settled on after trial and error and research is of value to the engineers at Life Sciences. . . . [¶] . . . He has some really interesting ideas as to how to reduce the complexity of the jelly manufacturing system that he shared with us and we'd appreciate the opportunity to pick his brain some more."[2]

In or around May 2011, Walters told Central Garden's general counsel that he believed Central Garden was going to be using some of Copper Harbor's technology. Walters offered to sell or license the technology to Central Garden for $300,000, which was an amount he believed Copper Harbor would be able to earn on a second year of the Packaging Agreement had it been extended. Central Garden did not accept Walters' proposal because it did not believe the technology was worth the amount demanded.

By January 2012, Central Garden's ant stake line in Dallas was operational. In June 2012, Johnson prepared another analysis of the automation's successes and failures and noted the new process led to quality improvements in the appearance, palatability, and consistency of the jelly. The improved filling process allowed Central Garden to reduce the amount of jelly placed in the product by 20 to 25 percent, providing additional savings. The project was on track to save Central Garden $1.2 million per year as he predicted, plus a $1 million savings from reducing inventory.

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[2] Central Life Sciences is the division of Central Garden that has made the ant stakes since 2012.

F. Copper Harbor's Claims

In May 2013, Copper Harbor sued Central Garden for misappropriation of trade secrets under the California Uniform Trade Secrets Act (CUTSA) (Civ. Code, § 3426 et seq.), breach of the NDA, breach of the Packaging Agreement, and unjust enrichment.[3] Copper Harbor claimed seven process improvements as trade secrets misappropriated by Central Garden:

(1) "[A]pplying the chemical process or unit operation known as a CSTR to the manufacture of jelly-filled ant stakes;"

(2) "The design and use of non-diving fill head(s) to direct hot liquid pre-jelly into a closed container through a small orifice;"

(3) "The use of positive displacement pump(s) to dispense hot liquid pre-jelly in precise and repeatable amounts to product fill head(s);"

(4) "The use of pH control, both manual and computer feedback controlled, to maintain consistent gel structure and other product qualities with changing syrup feed properties;"

(5) "The development and use of a temperature profile for processing syrup into a finished jelly product with a process using CSTR technology that minimizes caramelization and gel structure destruction."

(6) "The use of low-shear mixing of the non-Newtonian syrup/acid mixture;" and

(7) A combination trade secret consisting of the CSTR plus any of the other five non-CSTR components: temperature profile, low-shear mixing, pH control, positive displacement pumps, and non-diving fill heads.

G. Central Garden's Motions in Limine

Central Garden moved in limine to exclude argument and evidence of damages pursuant to the damages limitation provision in paragraph 7(b) of the Packaging Agreement. The motion was denied.

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[3] Copper Harbor also asserted a claim for unfair competition under Business and Professions Code section 17200. The trial court's judgment in favor of Central Garden on this claim, entered on July 15, 2016, is not a subject of this appeal.

Central Garden also moved in limine to exclude the testimony of Copper Harbor's damages expert, Peter Schwechheimer, claiming his opinions on Copper Harbor's damages and Central Garden's unjust enrichment were unsound and based on impermissible speculation. The trial court held a four-day hearing under Evidence Code section 402 (the "402 hearing") to determine whether there was an adequate foundational predicate for Schwechheimer's proposed opinions. The court granted Central Garden's motion in limine in part by imposing a temporal limitation on Schwechheimer's lost profit and unjust enrichment calculations, but the court otherwise found adequate support for his opinions to permit him to testify.

H. Trial, Verdict, and Judgment

Trial commenced in February 2016. After a two-month trial, the jury returned a verdict in favor of Copper Harbor. On the breach of contract claims, the jury found that Central Garden had breached the NDA and the Packaging Agreement. The jury awarded Copper Harbor $300,000 in lost profits damages for Central Garden's breach of the NDA, but awarded no damages for Central Garden's breach of the Packaging Agreement.[4]

On the claim for trade secrets misappropriation, the jury found that the use of non-diving fill heads, positive displacement pumps, and pH control were not trade secrets of Copper Harbor that were protected under CUTSA. However, the jury determined that the following process improvements were Copper Harbor's trade secrets and were misappropriated by Central Garden: (1) applying CSTR to the manufacture of jelly-filled ant stakes; (2) the development and use of a temperature profile for processing syrup into a jelly filled product with a process using CSTR; (3) the use of low-shear mixing of the non-Newtonian syrup/acid mixture with a CSTR; and (4) the combination of a CSTR, temperature profile, low-shear mixing, and pH control as applied to the manufacture of jelly-filled ant stakes (the four-component trade secret).

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[4] The jury also awarded Copper Harbor damages on a separate claim for breach of the Packaging Agreement as to unpaid freight costs, which Central Garden did not appeal.

The jury awarded no damages for Central Garden's misappropriations of the CSTR, the CSTR plus temperature profile, or the CSTR plus low-shear mixing. But for Central Garden's misappropriation of the four-component trade secret, the jury awarded Copper Harbor $109,361 in actual losses, and $1,718,694 for Central Garden's unjust enrichment.[5] After eliminating duplicative amounts among the claims, the jury awarded Copper Harbor a total of $300,000 in lost profits damages, and $1,718,694 for Central Garden's unjust enrichment. Judgment was entered in favor of Copper Harbor.

I. Post-Trial Motions and Appeal

Central Garden moved for judgment notwithstanding the verdict (JNOV) and modification of the judgment to eliminate duplication in damages. Central Garden also moved for a new trial. The trial court denied both motions. Thereafter, the trial court granted in part and denied in part Central Garden's motion to tax costs sought by Copper Harbor, and Copper Harbor was awarded $153,541.65 in costs (including expert witness fees), and $8,885.10 in prejudgment interest.

Central Garden appealed from the judgment and the denial of its post-trial motions, and from the post-judgment award of costs. The appeals were consolidated for briefing, argument, and decision.

DISCUSSION

There are three main prongs to Central Garden's appeal. First, Central Garden challenges the trial court's denial of JNOV as to the four-component trade secret, arguing there was insufficient evidence to support the conclusions that the non-CSTR components satisfied key elements for trade secrets and had any impact on Copper Harbor's damages. Second, Central Garden contends a new trial is required because the special verdicts were fatally inconsistent in awarding damages for only the four-

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[5] The available remedies under the CUTSA for misappropriation of trade secrets include injunctive relief, damages, royalties, punitive damages and attorney fees. (Civ. Code, §§ 3426.2–3426.4.) Civil Code section 3426.3, subdivision (a), provides that a complainant may recover damages for the actual loss caused by misappropriation, as well as for any unjust enrichment not taken into account in computing actual loss damages.

component trade secret and not for any of the individual non-CSTR components or for breach of the Packaging Agreement, and awarding a much smaller amount for breach of the NDA.[6] Third, Central Garden argues a new trial is required to correct the trial court's erroneous rulings regarding the jury's award of unjust enrichment and damages, including its allowance of Copper Harbor's expert testimony. As for the appeal from the post-judgment cost award, Central Garden simply argues that if the judgment is reversed on any or all of the above grounds, the cost award must be vacated, and entitlement to costs must be reevaluated after retrial.

We address these contentions seriatim.

A. The Trial Court's Denial of JNOV on the Four-Component Trade Secret

Central Garden accepts, for purposes of this appeal, that the application of a CSTR to the manufacture of jelly-filled ant stakes is Copper Harbor's trade secret. It argues, however, that the trial court should have granted JNOV because there was no evidence that the three non-CSTR components in the combination (temperature profile, pH control, and low-shear mixing): (1) were not generally known or had any element of secrecy; (2) added any trade secret value beyond the mere functional value of each part; and (3) were used or misappropriated from Copper Harbor by Central Garden. Central Garden further argues the trial court should have granted JNOV on the damages determination for the four-component trade secret.

A motion for judgment notwithstanding the verdict "may be granted only if it appears from the evidence, viewed in the light most favorable to the party securing the verdict, that there is no substantial evidence in support." (*Sweatman v. Department of Veterans Affairs* (2001) 25 Cal.4th 62, 68.) "On appeal from the denial of a motion for judgment notwithstanding the verdict, we determine whether there is any substantial evidence, contradicted or uncontradicted, supporting the jury's verdict. [Citations.] If

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[6] It bears emphasizing that Central Garden does not challenge the validity of the jury's $300,000 award for lost profits on Copper Harbor's claim for breach of the NDA other than to claim it is inconsistent with or duplicative of the awards on other claims.

there is, we must affirm the denial of the motion. [Citations.] If the appeal challenging the denial of the motion for judgment notwithstanding the verdict raises purely legal questions, however, our review is de novo." (*Wolf v. Walt Disney Pictures & Television* (2008) 162 Cal.App.4th 1107, 1138.)

1. *Secret/Not Generally Known to the Public*

For purposes of CUTSA, a " '[t]rade secret' means information, including a formula, pattern, compilation, program, device, method, technique, or process, that: [¶] (1) Derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use; and [¶] (2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy." (Civ. Code, § 3426.1, subd. (d).) " '[A] trade secret can include a system where the elements are in the public domain, but there has been accomplished an effective, successful and valuable integration of the public domain elements and the trade secret gave the claimant a competitive advantage which is protected from misappropriation.' " (*Altavion, Inc. v. Konica Minolta Sys. Lab. Inc.* (2014) 226 Cal.App.4th 26, 48 (*Altavion*).)

Central Garden argues there was no evidence that the non-CSTR components used in Copper Harbor's process had any element of secrecy or were not generally known. According to Central Garden, the combination of these non-CSTR components was not unique, but rather, was foreseeably dictated by the requirements of the ant stake manufacturing process, as any competent engineer would have monitored and controlled for temperature and pH and used low-shear mixing to manufacture the pectin-based jelly. Central Garden contends the temperature profile that Copper Harbor claims as a trade secret was actually provided to Copper Harbor by Central Garden's confectionary expert, Richardson.

Even if we accept the premise that the general concepts of pH and temperature control and low-shear mixing were publicly known, there was ample evidence that the precise details and parameters of Copper Harbor's use of these processes in combination with a CSTR were not. As Walters testified, the temperature and pH ranges provided by

Richardson were used as "starting points for the parameters that [Copper Harbor] would develop [its] process around," and Copper Harbor ultimately ended up using different temperature and pH targets. Copper Harbor's chemical engineering expert, David Rockstraw, testified that the changes Copper Harbor developed in terms of the temperature profile and pH targets, combined with the CSTR, were improvements over how things had been done at Central Garden, and Copper Harbor's particular U-shaped impeller design was more effective at agitating non-Newtonian fluids such as the syrup than the agitator he saw in the mixing tank at Grant, which was a ribbon blender agitator more commonly used to mix flowable solids (i.e., dough). Copper Harbor employed reasonable measures to keep all of its confidential information and process improvements secret through the NDA, the Packaging Agreement, and confidential labeling of shared information. Accordingly, Central Garden has not shown that these unique parameters, integrated into a single process with the CSTR, were generally known and therefore not protectible as trade secrets as a matter of law.

Central Garden argues that Copper Harbor's temperature profile and pH control parameters cannot be trade secrets because they were minor or trivial variations on well-known processes. (See *Electro-Craft Corp. v. Controlled Motion, Inc.* (Minn. 1983) 332 N.W.2d 890, 899 (*Electro-Craft*).) But we cannot say these parameters were minor or trivial as a matter of law given that they resulted in an improved and superior jelly product. Nor can it be said as a matter of law that these variations were self-evident or easily reproducible in light of the undisputed evidence that Central Garden's engineers visited Copper Harbor's facility multiple times in order to learn about the temperature and pH targets used.

Central Garden contends Copper Harbor did not claim trade secret status as to its particular pH control application or algorithm, but rather, claimed trade secret ownership of the entire concept of pH control in the manufacture of ant stakes jelly. We disagree. Copper Harbor's claimed trade secret regarding pH control was circumscribed by its intended effect—"to maintain consistent gel structure and other product qualities with changing syrup feed properties." This necessarily invoked the specific know-how to

accomplish pH control in a CSTR-based process to create a jelly with the desired consistency and structure.

As for low-shear mixing, Central Garden argues there is an industry consensus that this method must be used in the manufacture of pectin-based jelly, and Grant had been using low-shearing mixing for decades. Copper Harbor responds that the evidence of an industry consensus was disputed in three ways. First, Walters testified that high-shear mixing in a CSTR would be the more "obvious move" due to its availability and the intuitive sense that its power would mix better. Second, the evidence of an industry consensus for low-shear mixing pertained to the prevention of syrup hardening or scorching, not the step of mixing citric acid to form pectin gel. And third, Chocotech contemplated using high-shear mixing. Central Garden responds that Walters' testimony about high-shear mixing was in regards to Newtonian fluids, not non-Newtonian fluids; Walters admitted that Grant had been using low-shear mixing to manufacture the jelly before Copper Harbor started its process; and Chocotech did not contemplate using high-shear mixing for the syrup, but rather, for rehydrating the pectin powder with water.

We need not resolve each and every one of these points. For our purposes, given the applicable standard of review, Rockstraw's testimony constituted substantial evidence that Copper Harbor's impeller design for low-shear mixing was not generally known and constituted an improvement upon Central Garden's prior process. Central Garden argues there was no evidence that Copper Harbor's impeller design was not generally known. But viewing the evidence in the light most favorable to Copper Harbor, the undisputed evidence that Copper Harbor protected the secrecy of all its confidential information and process improvements was sufficient. And even if it was error for the jury to conclude that Copper Harbor's use of low-shear mixing with a U-shaped impeller in the manufacture of a pectin-based jelly was by itself a protectible trade secret, the error was harmless because no damages were awarded for the misappropriation of this process improvement. The use of low-shear mixing with a U-shaped impeller, even if not protectible as a trade secret by itself, when integrated with a CSTR and the precise temperature and pH parameters developed by Copper Harbor, provided a unique solution

to the needs of Central Garden to create a better ant stake jelly, and was therefore protectible as part of a combination trade secret. (*Electro-Craft*, *supra*, 332 N.W.2d at pp. 899–900; *Altavion*, *supra*, 226 Cal.App.4th at p. 48.)

2. *Added Value of the Non-CSTR Components*

"A combination qualifies as a trade secret only when there is an added value to the combination over the value of the individual parameters, i.e., when 'the whole is more than the sum of the parts.' " (*Catalyst & Chem. Servs. Global Ground Support* (D.C. 2004) 350 F.Supp.2d 1, 10 (*Catalyst*).) Central Garden argues that while the non-CSTR components performed functions necessary to heat, mix and control the acidity of the jelly, the evidence failed to support the conclusion that the value of the combination was more than the sum of its parts. According to Central Garden, the non-CSTR components had no real value because all cost savings were attributed by Copper Harbor's damages expert only to the CSTR.

This last assertion is incorrect. In the cited portion of his testimony, Schwechheimer was asked which of the claimed trade secrets was "most important" and he responded, "the belief was that CSTR was the driving force, the driving value behind the entire system. The other pieces were ancillary. [¶] . . . [S]o essentially the overwhelming majority of the value is in the CSTR process." Elsewhere, Schwechheimer testified the CSTR was "like the heart of the engine. So that's the most important part. *The other ones are – you know, had value, as well*." (Italics added.) Thus, Schwechheimer's testimony was that the non-CSTR components had some value as secondary parts of the process, even if the majority of value was attributable to the CSTR. The jury evidently did not interpret Schwechheimer's testimony to mean that only the CSTR had value and the non-CSTR components had no value. This is apparent from the special verdict form, which assigned no damages to *any* of the individual process improvements standing alone (including the CSTR), and instead assigned all damages to the four-component trade secret. Thus, while the CSTR was, comparatively speaking, more important to the overall process than the other elements, the successful integration of all four elements was necessary to yield a valuable trade secret.

Central Garden also contends Schwechheimer testified that "the savings benefit obtained from the combination trade secret would not change even if some or even all of the non-CSTR parts of the combination *were not included*." (Italics added.) Central Garden again misstates Schwechheimer's testimony. In actuality, he testified he would not have changed his unjust enrichment calculation even "if the jury were to conclude that any one of the remaining five or any combination of those five weren't in fact trade secrets." As indicated, a combination trade secret made up of public domain elements can still be protectible as a valuable process. (*Altavion, supra,* 226 Cal.App.4th at p. 48.)

Other evidence supported the added value of the four-component trade secret (consisting of the CSTR, temperature control, pH control, and low-shear mixing). In a factual recital to paragraph 11(b) of the Packaging Agreement, Central Garden "agree[d] that the process developed by [Copper Harbor] is valuable and remains the sole property of [Copper Harbor]." "The facts recited in a written instrument are conclusively presumed to be true as between the parties thereto." (Evid. Code, § 622.) Central Garden argues the agreement's reference to "process" does not include generally-known processes such as the non-CSTR components. Again however, substantial evidence established that the precise details and parameters of the non-CSTR components of Copper Harbor's process were not publicly known. And even if we were dealing with public domain components, the jury could reasonably have construed "process" in paragraph 11(b) to refer to the entire combination of CSTR and non-CSTR elements, and the application of this integrated process to the manufacture of ant stake jelly was not shown to be a matter of public knowledge.

We also find substantial evidence of the added value of the combination trade secret in the statements of Central Garden's engineers. Brown acknowledged in an internal email that "[Walters'] experience with the jelly and the equipment he has settled on after trial and error and research is of value to the engineers at Life Sciences." The jury could reasonably have construed the reference to Walters' "experience with jelly and the equipment" he used to include all the elements of the combination process, including the non-CSTR components. Indeed, other emails showed that Parker and Brown were

eager to visit Copper Harbor's facility in order to gain more information about the citric acid addition process, including information about temperature and pH. Based on the evidence of Central Garden's eagerness to obtain more details about the non-CSTR components used in Copper Harbor's process, the jury could reasonably have concluded that the CSTR was not the only improvement that added value to the process as a whole.

Finally, there was evidence of value and cost savings in Central Garden's continued use of the process. Central Garden argues that any benefits it obtained were a function of the more precise filling mechanisms used in the automated process that the jury found *not* to be trade secrets (i.e., positive displacement pumps and non-diving fill heads). Viewing the record in the light most favorable to Copper Harbor, however, we find the jury could reasonably have concluded the evidence—particularly the testimony about the stability of the jelly produced by Copper Harbor's mixing process—reflected results owing to Copper Harbor in the mixing stage of the process that yielded a better and more cost efficient ant killer, and thus, a more valuable product.

3. *Use or Misappropriation of the Non-CSTR Components*

Central Garden argues there was no evidence it used or misappropriated the non-CSTR components from Copper Harbor, inasmuch as its automated process in Dallas used: (1) a temperature profile 30 degrees cooler than the one Copper Harbor claimed as a trade secret; (2) a different brand of pH probe; and (3) a different target pH range. Central Garden further contends there can be no misappropriation of the non-CSTR components because the evidence showed it knew about low-shear mixing and temperature and pH control before collaborating with Copper Harbor.

"In the context of trade secret misappropriation, information may be improperly 'used' in that it is unlawfully acquired and then built upon or modified before being disclosed or benefit derived." (*SkinMedica, Inc. v. Histogen, Inc.* (2012) 869 F.Supp.2d 1176, 1193 (*SkinMedica*).) " '[A] party may not use another's trade secret even with independent improvements or modifications, so long as the product or process is substantially derived from the trade secret. [Citations.] If the law were not flexible enough to reach such modifications, trade secret protection would be quite hollow.' "

(*American Can Co. v Mansukhani* (7th Cir. 1984) 742 F.2d 314, 328–329.) Thus, a defendant in a trade secrets misappropriation case "cannot escape responsibility by showing that [it has] improved upon or modified plaintiff's process." (*By-Buk Co. v. Printed Cellophane Tape Co.* (1958) 163 Cal.App.2d 157, 168–169.)

We conclude there was substantial evidence supporting the jury's verdict that Central Garden used or misappropriated Copper Harbor's trade secrets. Rockstraw testified that the tank used in Central Garden's Dallas facility "ha[d] all the characteristics of a CSTR" in terms of the "continuous feed of materials, continuous withdraw of your product, and uniform conditions within the reactor, which are the basic elements of a continuous-stirred tank reactor." Rockstraw also saw pH monitoring and control at the Dallas facility and testified there was no material difference between the pH probe brand used by Copper Harbor and the one used in Dallas, and he attributed the different pH target ranges to the membrane materials in each brand of probe. He further testified there was no meaningful difference between the U-shaped impeller used by Copper Harbor and the "anchor-shaped" impeller used by Central Garden in its mixer. Finally, Rockstraw testified he saw no evidence that would suggest Central Garden had independently developed its automated process in Dallas, such as a documentation trail, drawings, or laboratory data. Rockstraw concluded that any changes employed by Central Garden since its implementation of Copper Harbor's technology would not alter his opinion because the changes represented continued development.

Central Garden's use of Copper Harbor's trade secrets is also circumstantially supported by the evidence that Parker sought information from Copper Harbor on temperature and pH and acknowledged that this information was important to her. Central Garden tries to dismiss this testimony as showing the information was relevant to just one individual at one point in time, or was merely possessed or internally discussed, but not used. (See *O2 Micro Inter., Ltd. v. Monolithic Power Systems, Inc.* (N.D.Cal. 2005) 399 F.Supp.2d 1064, 1072 (*O2 Micro*) [mere possession or internal discussion of trade secret information is not use].) Viewing the evidence in the light most favorable to Copper Harbor, however, we find it significant that Parker was Central Garden's

chemical engineer who was working on the in-line citric acid addition stage at the Dallas facility, and she and Brown—Central Garden's director of engineering—visited Copper Harbor's facility in the months just before Central Garden began its own production in Dallas. Combined with the evidence of the concern Central Garden's engineers expressed about proceeding with the Dallas automation before better understanding Copper Harbor's filling process, Central Garden's eventual use of a CSTR-based manufacturing process, and Rockstraw's testimony that he saw no evidence of Central Garden's independent development of its own process, the record amply supports the jury's finding that Central Garden used Copper Harbor's trade secrets in developing its Dallas process. (See *O2 Micro*, at p. 1072 [internal experimentation, manufacturing, production, research and development constitute use].)

That pH control and low-shear mixing were mentioned in the automation proposals Central Garden received from other vendors does not compel the conclusion that Central Garden's process was not substantially derived from Copper Harbor's. Those proposals were not actual demonstrations of a working production line, and Central Garden had tabled the automation project for years. It was not until Copper Harbor demonstrated the superior quality of its jelly at production levels that Central Garden sent its engineers to Copper Harbor multiple times to learn about the precise parameters Copper Harbor used. Shortly thereafter, Central Garden created its own process in Dallas, with no documentation trail showing independent development. On this record, we have no trouble concluding there was substantial evidence to support the jury's finding of use under the substantially-derived standard.

Central Garden cites *American Airlines, Inc. v. KLM Royal Dutch Airlines, Inc.* (8th Cir. 1997) 114 F.3d 108, 112 (*American Airlines*) for the proposition that if a defendant's alleged use includes some but not all elements of the combination trade secret, then there is no misappropriation of the combination trade secret. We find no support for this "all or nothing" theory in *American Airlines*, which involved no facts,

argument, or discussion as to whether the defendant substantially derived a combination trade secret process from the plaintiff.[7]

What is more, Central Garden's "all or nothing" theory was rejected in *SkinMedica*, a case Central Garden incorrectly claims did not involve a combination trade secret. There, one of the claimed trade secrets (the "Bioreactor Method") contained a "unique combination of elements," and the court rejected the argument of the defendant (Histogen) that there was no misappropriation because Histogen did not use several of the claimed elements. (*SkinMedica, supra,* 869 F.Supp.2d at pp. 1195–1197.) "[T]his scattershot attempt to disclaim use of various elements of the claimed trade secrets does not foreclose the possibility that Histogen's process was not substantially derived from the claimed trade secrets, even if it differed in specifics from the process described therein." (*Ibid*.) Likewise, Central Garden's attempt to disclaim misappropriation or use of some elements of Copper Harbor's process does not, in light of all the evidence, compel the conclusion that Central Garden did not substantially derive its process from Copper Harbor.

4. *Damages for the Four-Component Trade Secret*

Central Garden argues that even if the four-component trade secret was protectible, the trial court erred in denying JNOV on the corresponding unjust enrichment award. Central Garden reasons as follows: The jury determined the CSTR and the CSTR

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[7] In *American Airlines*, the plaintiff claimed a trade secret composed of five elements "known at the conceptual level in the airline industry and in the public domain" combined with secret algorithms and formulae. (*American Airlines, supra,* 114 F.3d at p. 109.) After it was revealed that the defendant had knowledge of only four of the five public domain elements and did not know the secret algorithms or formulae, the defendant moved for summary judgment. (*Id*. at p. 110.) Subsequently, the plaintiff's president testified in deposition that four of the public domain elements alone constituted a trade secret. (*Ibid*.) The Eighth Circuit upheld the grant of summary judgment, finding "the district court correctly disregarded the subsequent manufactured contradictory testimony of [plaintiff's president] and concluded that no factual issue for trial existed for the reason that [the defendant] never received any trade secret of [the plaintiff's]." (*Id*. at p. 112.) Although Central Garden accuses Copper Harbor of similarly attempting to redefine its trade secrets post hoc, the record does not show that Copper Harbor redefined its trade secret in a manner similar to the situation in *American Airlines*.

plus either just the temperature profile or just low-shear mixing gave rise to no damages or unjust enrichment, but the jury also concluded the four-component trade secret as a whole caused $1,718,694 in cost savings that unjustly enriched Central Garden. Therefore, the jury must have found that the addition of the two additional components (pH control and either temperature profile or low-shear mixing) created those damages, but there was no evidence supporting this conclusion. In Central Garden's words, Schwechheimer "ascribed all damages/unjust enrichment to the CSTR mixer and expressly testified that the addition of the other components had *no* impact on damages" and "that the savings benefit obtained from the combination trade secret would not change even if some or even all of the non-CSTR parts of the combination were not included."

As already discussed, Schwechheimer testified the CSTR was comparatively the most important element in the combination, and the other elements also still had value. He also explained that his calculation would not change if the non-CSTR parts were not found to be trade secrets by themselves. This was consistent with the settled principle that a combination trade secret can consist of individual components that do not merit protection by themselves. (*Altavion*, *supra*, 226 Cal.App.4th at pp. 47–48.) The unjust enrichment award reflected the jury's conclusion that the *combination* of the CSTR and non-CSTR components was integral to creating a valuable trade secret, and it was the unauthorized use of this combination that unjustly enriched Central Garden. The trial court did not err in denying JNOV on the jury's award for the four-component trade secret.

B. Inconsistent Special Verdict Findings

Central Garden argues a new trial was warranted due to fatally inconsistent findings in the special verdict. Specifically, Central Garden argues the $1,718,694 unjust enrichment award as to the four-component trade secret is fatally inconsistent with: (1) the award of no damages on the non-CSTR components; (2) the award of no damages for breach of the Packaging Agreement; and (3) the award of a much lesser amount ($300,000) for breach of the NDA.

" 'Inconsistent verdicts are " 'against the law' " ' and are grounds for a new trial." (*City of San Diego v. D.R. Horton San Diego Holding Co., Inc.* (2005) 126 Cal.App.4th 668, 682.) "A special verdict is inconsistent if there is no possibility of reconciling its findings with each other." (*Singh v. Southland Stone, U.S.A., Inc.* (2010) 186 Cal.App.4th 338, 357–358 (*Singh*).) "Where special verdicts appear inconsistent, if any conclusions could be drawn which would explain the apparent conflict, the jury will be deemed to have drawn them." (*Wysinger v. Auto. Club of Southern California* (2007) 157 Cal.App.4th 413, 424 (*Wysinger*).) "On appeal, we review a special verdict de novo to determine whether its findings are inconsistent." (*Singh*, *supra*, 186 Cal.App.4th at p. 358.)

It is not apparent from the parties' briefing or the record on appeal whether Central Garden objected to the special verdict or sought clarification of the purported inconsistencies before the jury was discharged. "[F]ailure to object to the form of a verdict before the jury is discharged has been held to be a waiver of any defect." (*Woodcock v. Fontana Scaffolding & Equip. Co.* (1968) 69 Cal.2d 452, 456, fn. 2 (*Woodcock*); see *Jensen v. BMW of North America* (1995) 35 Cal.App.4th 112, 131 [objection to special verdict form waived].) Even if waiver is not found, "[i]f no party requests clarification or an inconsistency remains after the jury returns, the trial court must interpret the verdict in light of the jury instructions and the evidence and attempt to resolve any inconsistency." (*Singh*, *supra*, 186 Cal.App.4th at pp. 357–358.) "Where the trial judge does not interpret the verdict or interprets it erroneously, an appellate court will interpret the verdict if it is possible to give a correct interpretation." (*Woodcock*, *supra*, 69 Cal.2d at p. 457.) We will reverse only if "the verdict is 'hopelessly ambiguous.' " (*Roby v. McKesson Corp.* (2009) 47 Cal.4th 686, 705.)

For reasons already discussed, we find no inconsistency between the jury's award of $1,718,694 in unjust enrichment in connection with the four-component trade secret, but not on any of the non-CSTR components. These findings logically reflect the consistent position that Central Garden was unjustly enriched by its misappropriation of

the four-component process as a whole, not by its use of any of the non-CSTR components individually.

The jury's awards of $1,718,694 in unjust enrichment damages for the four-component trade secret but nothing for breach of the Packaging Agreement are easily reconciled. The award for unjust enrichment may properly include any benefits obtained by Central Garden, over and above the value of the technology and methods protected under the Packaging Agreement. Additionally, the limited time period of the Packaging Agreement (one year beginning on January 28, 2011) may also explain the difference in the awards. It was not inconsistent to deny damages for a breach of the Packaging Agreement that occurred in January 2012 at the tail end of the contractual period, while awarding unjust enrichment on a CUTSA claim that was not subject to the same temporal limitation.

Likewise, the Packaging Agreement's one-year temporal scope also reasonably explains the jury's decision to deny damages for Central Garden's breach of the Packaging Agreement, while awarding $300,000 for its breach of the NDA. Additionally, the awards are not inconsistent because the two contracts protected different bundles of rights. The Packaging Agreement protected Copper Harbor's "improvements and/or modifications to the manufacturing process," while the NDA protected Copper Harbor's "Confidential Information," including "any strategic information, studies, ideas, . . . or know-how related to the business of the Disclosing Party, research data, services, development, operating procedures, processes, [and] designs." As Copper Harbor observes, certain information could be protectible "know-how" under the NDA (i.e., Copper Harbor's experiences with trial and error) without being an "improvement" or "modification" to the process within the meaning of the Packaging Agreement.

Finally, we are not persuaded that the jury's award of $1,718,694 in unjust enrichment on the CUTSA claim is hopelessly inconsistent with or duplicative of its $300,000 award on the breach of the NDA claim, as these were separate causes of action involving proof of different facts. (*Wysinger*, *supra*, 157 Cal.App.4th at p. 424.) The

jury was instructed to eliminate duplication among the monetary awards, including any duplication between the unjust enrichment award and actual losses already awarded. " 'Absent some contrary indication in the record, we presume the jury follows its instructions.' " (*Scott v. C.R. Bard, Inc.* (2014) 231 Cal.App.4th 763, 784.) Here, the record supports that presumption since the jury eliminated duplicate damages in the amount of $109,361 for actual losses attributable to Central Garden's misappropriation of the four-component trade secret.

Central Garden does not contend separate awards for breach of the NDA and unjust enrichment under the CUTSA were not permitted as a matter of law, and Central Garden fails to demonstrate that these claims were "based on the same core contention that Central Garden had misused the same proprietary information." The NDA defined protected "confidential information" as including "any strategic information, studies, ideas, marketing or retailing plans, customer lists, projections, budgets, product information, pricing information, or know-how related to the business of the Disclosing Party, research data, services, development, operating procedures, processes, [and] designs" provided by one party to the other. This was potentially broader than the legal definition of a "trade secret" under the CUTSA. (Civ. Code, § 3426.1, subd. (d).) Thus, the jury could consistently find that the non-trade secret process improvements (i.e., use of non-diving fill heads, positive displacement pumps, and pH control) were not trade secrets, but were still covered by the NDA, or that Copper Harbor's development experience, including its trials and errors, was compensable under the NDA even though Copper Harbor had not claimed that information as trade secrets.

Central Garden points out that the jury was identically instructed on both the CUTSA and breach of NDA claims to determine the value of the benefit to Central Garden. But the jury was additionally instructed on contract damages "to put Copper Harbor in as good a position as it would have been if Central Garden & Pet had performed as promised." Compensation for a breach of contract includes what subtractions from the injured party's wealth (losses) have been caused by the breach. (*Ajaxo Inc. v. E*Trade Group Inc.* (2005) 135 Cal.App.4th 21, 56.) Accordingly, the jury

could reasonably have decided to make Copper Harbor whole for the amounts it expended in developing the ant stake manufacturing process in reliance on Central Garden's promised adherence to the NDA, which would not have duplicated a CUTSA award based on Central Garden's cost savings in using the misappropriated process.

Central Garden surmises the most likely source of the $300,000 damages figure was the testimony of Walters that he offered a license in that amount, and thus it was duplicative of the award for unjust enrichment for the use of the same information. However, this is not the only possible interpretation of the record, as demonstrated by the foregoing discussion. We interpret the verdict " ' "so as to uphold it and to give it the effect intended by the jury." ' " (*OCM Principal Opportunities Fund v. CIBC World Markets Corp.* (2007) 157 Cal.App.4th 835, 877.)

In its reply brief, Central Garden argues there was no evidentiary basis for the jury to conclude that any non-trade-secret processes, information, or development costs were worth $300,000 in contractual damages. But as we have emphasized, Central Garden has not challenged the sufficiency of the evidence supporting the jury's award of contractual damages, only the consistency of the different awards, and this after having failed to object or seek clarification before the jury was discharged. Under these circumstances, our role is not to determine why the jury awarded the precise amount that it did, but rather we assess whether it is possible to explain any purported conflicts in the awards. (*Woodcock*, *supra*, 69 Cal.2d at p. 457; *Wysinger*, *supra*, 157 Cal.App.4th at p. 424.) For the reasons stated above, we find no fatal inconsistencies in the special verdict that warrant a new trial.

C. Claimed Errors Regarding the Unjust Enrichment Award

Central Garden argues a new trial is required to correct the jury's unjust enrichment award because the trial court improperly allowed Copper Harbor's expert to give speculative and unreasoned opinions. Central Garden further argues the trial court erred in refusing to impose a contractual damages limitation provision found in paragraph 7(b) of the Packaging Agreement.

1. *Copper Harbor's Expert on Unjust Enrichment*

a. Additional Background Facts

Schwechheimer testified that Central Garden unjustly realized $5,341,723 in cost savings by utilizing Copper Harbor's trade secrets. He found three main categories of savings: labor cost savings, material cost savings, and inventory cost savings, and he measured the cost savings by comparing Central Garden's pre-automation manufacturing costs that it incurred in 2009 with its costs of operating the fully automated process in Dallas in 2012.

Schwechheimer made two key assumptions in support of this opinion. First, he assumed Central Garden would be unjustly enriched until the year 2023. Second, he assumed ant stake unit production and sales (and the corresponding savings) would grow 5 percent annually from 2016 through 2023.

Schwechheimer's cost savings opinion initially included benefits related to process improvements in the packaging stage that were ultimately not found to be trade secrets (i.e., use of non-diving fill heads and positive displacement pumps). To address this, Schwechheimer presented the jury with an alternative unjust enrichment opinion in which he attempted to deduct cost savings associated with the packaging part of the process. The jury was provided with Schwechheimer's annual cost saving figures each year from 2011 to 2023 from which it could deduct any year it concluded Central Garden obtained no benefit from the trade secrets.

During trial, Central Garden submitted evidence that problems with the automated process in Dallas caused it to incur additional expenses. Specifically, Central Garden's senior brand manager, Andrea Fuller, testified that in the summer of 2014, she learned about an uptick in customer complaints regarding the efficacy of the ant stakes. Central Garden hypothesized that the jelly was filled too far away from the opening in the stake to attract ants. After conducting field testing, the decision was made to add more jelly to the stakes, even though the field testing was "inconclusive." Adding more jelly to the stakes generated an additional cost of 3.5 cents per stake. Schwechheimer testified that this additional cost should not reduce Central Garden's cost savings because the trade

secrets themselves had nothing to do with the quantity of jelly used. Nevertheless, he presented alternative calculations to account for these higher manufacturing costs in the years 2015, 2016 and 2017.

Finally, Schwechheimer opined that Copper Harbor suffered $2,870,294 in lost profits for Central Garden's breach of the Packaging Agreement and as actual losses for trade secret misappropriation. He assumed that if Central Garden had not used Copper Harbor's trade secrets, Copper Harbor would have continued to package Central Garden's ant stakes until 2023. He also relied on Walters' testimony that Copper Harbor would have been able to achieve a 2.5 cent per stake profit margin if it had been able to institute various changes to the manufacturing process.

b. Comparison of Pre- and Post-Automation Costs

Central Garden argues it was prejudicial error for the trial court to allow Schwechheimer to compare Central Garden's pre- and post-automation costs in support of his cost savings opinion because this methodology improperly included savings from the entire automation process, such as savings arising from the packaging step and inventory benefits not related to automation.

"We review a trial court's evidentiary rulings for abuse of discretion." (*People v. Mora and Rangel* (2018) 5 Cal.5th 442, 502.) When a trial court considers allowing expert testimony, "the trial court acts as a gatekeeper to exclude expert opinion testimony that is (1) based on matter of a type on which an expert may not reasonably rely, (2) based on reasons unsupported by the material on which the expert relies, or (3) speculative." (*Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 771–772 (*Sargon*).) But this "preliminary determination whether the expert opinion is founded on sound logic is not a decision on its persuasiveness. The court must not weigh an opinion's probative value or substitute its own opinion for the expert's opinion. Rather, the court must simply determine whether the matter relied on can provide a reasonable basis for the opinion or whether that opinion is based on a leap of logic or conjecture. . . . [I]t conducts a 'circumscribed inquiry' to 'determine whether, as a matter of logic, the studies and other information cited by experts adequately support

the conclusion that the expert's general theory or technique is valid.' [Citation.] The goal of trial court gatekeeping is simply to exclude 'clearly invalid and unreliable' expert opinion." (*Sargon*, at p. 772.) Moreover, " ' [t]he trial court is given considerable latitude in determining the qualifications of an expert and its ruling will not be disturbed on appeal unless a manifest abuse of discretion is shown.' " (*People v. Cooper* (1991) 53 Cal.3d 771, 813.)

We find no abuse of discretion by the trial court in permitting Schwechheimer to compare pre- and post-automation costs in support of his cost savings opinion. There was nothing unsound about comparing the costs of production for the only two processes that Central Garden had ever actually used. While it is true Schwechheimer's cost savings opinion assumed Central Garden would have continued making ant stakes using a non-automated process, this was not an unreasonable assumption given that Central Garden had tabled its own automation plans for many years.

Nor was it clearly invalid for Schwechheimer to attribute the cost savings to the entire automation process without isolating the savings arising only from the claimed trade secrets. Schwechheimer testified that the CSTR was the "driving force" behind the entire process. Rockstraw similarly testified that the application of the CSTR "permitted the automation of the rest of the equipment" and "enable[d] all of the continuous processing that comes downstream." "[T]he CSTR is an enabling device to permit you to automate the filling of the stakes . . . [¶] . . . [b]ecause the CSTR provides you with a continuous flow of uniform material that you can then employ in your dispensing and automating systems." These conclusions were supported by the evidence, which showed that Central Garden had used a mostly manual process for decades and postponed automation plans for several years until it learned about Copper Harbor's process in detail, whereupon it was able to create an automated facility in a relatively short time. Taken together, there was substantial evidence that Copper Harbor's trade secrets made Central Garden's entire automated process (and the cost savings therefrom) a realistic possibility.

Central Garden argues Schwechheimer wrongly assumed all inventory reductions were attributable to automation without considering other possible reasons why inventory levels changed over the years such as lower sales, improved inventory management or other non-automation features. This assumption was not speculative or unsound, but was consistent with the analysis by Johnson, Central Garden's confectionary expert, that automating the process would result in significant savings due to inventory reduction. The assumption was also consistent with the evidence showing significant drops in Central Garden's ant stake inventory levels in the immediate years after it implemented its automated process. Central Garden was free to challenge Schwechheimer's assumption by submitting evidence of other causes for the inventory reduction, which it did through the testimony of its expert that the inventory savings "were attributed to consolidating the process under one roof."

Central Garden argues that Schwechheimer's unjust enrichment opinion wrongly included all benefits generated by the trade secrets, including gains from other causes, and there was no way for the jury to make a meaningful allocation because Copper Harbor did not present damage calculations allocating among each of the components. Even if we assume error, however, Central Garden fails to show prejudice. As mentioned, Schwechheimer's alternative unjust enrichment opinion deducted cost savings associated with the packaging part of the process, and the unjust enrichment award was the precise sum of Schwechheimer's alternative fill-only calculations for the years 2012 through 2016. Although we cannot say with absolute certainty the jury did so to eliminate the savings attributed to automated handling, we see no reasonable probability that Central Garden would have obtained a more favorable result had the savings from the packaging parts of the process been deducted from the outset.

c. Projected Cost Savings Until 2023

Central Garden argues the trial court abused its discretion in allowing Schwechheimer to project cost savings up to 2023. It was speculative and unreliable, Central Garden maintains, for Schwechheimer to make assumptions and projections more than ten years into the future without considering factors such as long-term market

developments and technological improvements. Central Garden further argues the cost savings period was improper because it greatly surpassed the life of the claimed trade secrets. According to Central Garden, the testimony at trial demonstrated that it would take a reasonably competent engineer only four months to develop the same secrets from scratch because the CSTR was an obvious and logical application for ant stakes. In a related argument, Central Garden argues the trial court erred in rejecting Central Garden's proposed jury instruction that Copper Harbor's damages from the trade secret misappropriation must be limited to the time period in which Central Garden could not have engineered the same process on its own.[8]

We reject these contentions. Schwechheimer did consider market factors by discussing how demand was "fairly stable" and there were few competitors in the market for ant-killing gel products. His assumption that Central Garden would likely continue to use the automated process for years to come appeared logical given the amount of money Central Garden had invested and the time it had taken to find an automated solution, and it was corroborated by the projected 10-year use of the process in Central Garden's CAPEX request. At the time of trial, Central Garden had been using its automated process for five years, and Central Garden's senior brand manager, Fuller, testified it would be expensive to change the production line that was already in place. On this record, Schwechheimer's projected cost savings period was logical and consistent with the evidence of Central Garden's history and practice.

Central Garden cites no California appellate authority in support of what it terms the "independent development limitation rule," and the out-of-state authorities cited by Central Garden in no way support its position that the unjust enrichment period in this case should have been limited to a few months as a matter of law. *Plant Indus., Inc. v. Coleman* (C.D.Cal. 1968) 287 F.Supp. 636 is factually distinguishable as involving a

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[8] We review de novo any contention that a jury instruction did not correctly state the law. (*People v. Posey* (2004) 32 Cal.4th 193, 218.) There is no rule of automatic reversal for civil instructional error, and the appellant must show it is reasonably probable that a result more favorable would have been reached in the absence of the error. (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 580–581.)

process for preparing citrus peels that the court found to be " 'simple' by modern science and industry." (*Id.* at p. 645.) In *Anaconda Co. v. Metric Tool & Die Co.* (E.D. Pa. 1980) 485 F.Supp. 410, the court imposed a 16-month injunction based on its estimate of the time it would take a competent manufacturer to reverse-engineer the plaintiff's product (*id*. at pp. 419, 431), but here, there was no evidence suggesting Copper Harbor's process could have been reverse-engineered from the finished product. And in *Reinforced Molding Corp. v. GE* (W.D. Pa 1984) 592 F.Supp. 1083, the time period for having a defendant account for its unjust enrichment was defined as "the time it would have taken defendant to create the product *absent the misappropriation*." (*Id*. at p. 1088, italics added.) In contrast, the misappropriation here included the very knowledge that a CSTR could be successfully applied in the ant stake manufacturing process, which Central Garden concedes is Copper Harbor's trade secret. Even if Central Garden could have engineered a CSTR-based process in a matter of months, the jury could reasonably have rejected any evidence purporting to show that Central Garden could have done so "absent the misappropriation" (*ibid*.), i.e., without having misappropriated Copper Harbor's key trade secret knowledge.

Even if we assume error, Central Garden fails to demonstrate any resulting prejudice. That it was "logical" for experts like Walters and Rockstraw to apply a CSTR to the manufacture of ant stake jelly did not require the jury to find that any reasonably competent engineer tasked with automating Central Garden's process would have immediately turned to a CSTR. When asked whether a skilled chemical engineer would have been able to develop the same process in a matter of months, Rockstraw was careful to define a " 'skilled chemical engineer' " to mean "someone with a background similar to [Walters]" "who had significant background in designing and operating CSTRs." None of Central Garden's engineers was shown to have a significant background designing and operating CSTRs. Indeed, Parker and Brown had never before used or heard of a CSTR being used on a jelly. Nor did it appear that a CSTR was an obvious application to the vendors who submitted automation proposals to Central Garden, as none proposed a CSTR-based process. And even after Central Garden's automated

process was up and running, the production line was down for significant portions of time in 2015 while Central Garden contended with operational flaws in its process, thus further undermining Central Garden's assertion that the process could have been successfully engineered within a few months.

Any claim of prejudice is further belied by the particular amount of the unjust enrichment award. The award was the precise sum of the adjusted cost savings set forth by Schwechheimer for the years 2012 to 2016.[9] In other words, it is almost certainly the case that the jury did not adopt Schwechheimer's projection of cost savings out to 2023, and instead, ended the period of unjust enrichment substantially sooner. On this record, we see no reasonable probability of a more favorable result for Central Garden absent the perceived errors.

d. Projected 5 Percent Annual Sales Growth

Central Garden argues the trial court erred in allowing Schwechheimer to testify on the assumption that ant stakes sales would grow by 5 percent each year between 2016 and 2023. According to Central Garden, this projection was not based on market data or analysis, but on an outdated projection from Johnson's 2010 sensitivity analysis that proved to be inaccurate based on actual sales numbers for 2010 to 2015. Central Garden points out that during the 402 hearing, the trial court was skeptical of the evidence Copper Harbor presented in support of its 5 percent assumption, but the court eventually accepted Schwechheimer's assumption that applying an annual 5 percent growth rate to the 2015 sales number would mathematically return the sales to Central Garden's historical sales average by the year 2023. Central Garden argues the court's reasoning was circular and arbitrary, and there was no evidentiary basis to assume Central Garden's sales would return to average historical levels, or that the ant stake market would dramatically improve.

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[9] Schwechheimer's annual cost savings figures for 2012 to 2016 were, respectively, $69,970, $298,726, $333,621, $501,580, and $514,797. These figures totaled $1,718,694, which matched the exact amount of the jury's total award.

Setting aside the unlikelihood that the jury actually adopted Schwechheimer's projections out to 2023, we find no abuse of discretion. Schwechheimer did not blindly rely upon Johnson's 2010 analysis for his 5 percent growth assumption. He corroborated it through his own calculations that Central Garden had experienced 3.5 percent growth in actual sales rates from 2013 to 2015. Schwechheimer also took into consideration a key event—the return of Lowe's as one of Central Garden's largest customers in 2015, after having previously lost Lowe's business in 2012, which had caused Central Garden to lose 3.5 million stake sales per year. Finally, Schwechheimer considered Central Garden's own projection in 2015 that its ant stake sales would increase 19 percent.

As Central Garden points out, the 19 percent projection did not come to fruition due to unforeseen circumstances with Lowe's in 2015. Fuller testified that sales numbers were disappointing in the first quarter of fiscal year 2016 (October 2015 to October 2016) because Lowe's began ordering products later than it typically had in the past, and it had to reconfigure its shelf space to accommodate new products. By the time of trial, however, these problems had been resolved. Thus, the testimony suggested that the disappointing sales numbers in early fiscal year 2016 were temporary and were potentially resolved in time for the next wave of seasonal demand. Even if 19 percent was no longer achievable, we cannot say it was clearly invalid for Schwechheimer to predict a more modest 5 percent sales growth as a long-term trend given the return of Lowe's and the resolution of the obstacles that had stifled sales growth earlier in the fiscal year.

Central Garden argues that Schwechheimer's 3.5 percent growth calculation between 2013 and 2015 was a mischaracterization of the record because Central Garden did not sell 3.5 percent more ant stakes during those years, but instead, experienced a 1 percent decline in sales. Central Garden accuses Schwechheimer of intentionally disregarding the actual reported sales figures for those years. From our review of the record, it appears Schwechheimer calculated 3.5 percent growth based on data he obtained from Central Garden's earlier interrogatory responses, but shortly before trial, Central Garden served a fourth supplemental interrogatory response indicating there was

a mathematical error in a prior response regarding the number of ant stakes sold in June 2015. Schwechheimer testified that he did not rely on the figures in the supplemental response because he could not corroborate them, and Central Garden does not indicate whether Schwechheimer had access to the corroborating data he sought. On this record, we cannot say Schwechheimer's reliance on data from Central Garden's sworn interrogatory responses, and his refusal to consider supplemental responses that he apparently was unable to corroborate, was so clearly invalid and unreliable that the trial court abused its discretion in allowing him to testify as he did.

Central Garden takes issue with Schwechheimer's assumption that ant stake sales would gradually return over seven years to the average historical production levels already experienced from 2004 to 2011. But this assumption does not appear unsound or unsupported by evidence. As Schwechheimer explained, the use of an average historical sales level was logical given the stability of Central Garden's ant stake sales over the years, and he saw no evidence of a fundamental shift in demand for ant stakes. Attributing the "significant drop" in sales beginning in 2012 to the loss of Lowe's as a customer at that time, Schwechheimer reasonably assumed sales would return to historical levels after Central Garden had regained the Lowe's business.

e. Projected Lost Profits of 2.5 Cents Per Ant Stake

Central Garden argues it was prejudicial error to allow Copper Harbor to present a damages theory of $2,870,294 in lost profits by assuming a loss of 2.5 cents for every ant stake Central Garden sold from 2012 to 2023. Central Garden argues this calculation was not based on financial information or independent analysis, but on an unsupported projection by Walters that Copper Harbor would have been able to achieve this profit margin if it were able to institute various manufacturing changes. Central Garden further criticizes Schwechheimer for failing to deduct overhead or other costs, and for wrongly assuming that, but for the misappropriation, Central Garden would have abandoned its automation project and continued purchasing ant stakes from Copper Harbor until 2023.

Again, setting aside the unlikelihood that the jury based its award on Schwechheimer's projections out to 2023, we note Central Garden cites no authority for

the proposition that a damages expert cannot rely on financial information from a business entity's founder and principal. (See *Maatuk v. Guttman* (2009) 173 Cal.App.4th 1191, 1198 [expert may rely on any information of type reasonably relied on by an expert, even if hearsay, and from nonexpert].) More importantly, Schwechheimer did not simply parrot Walters' projection. He also based his opinion on the fact that Copper Harbor enjoyed an average profit margin of 48 percent from its previous production of 24 million ant stakes for Central Garden, while also estimating certain efficiencies that were to be expected from a more dependable production flow and better resource planning. Schwechheimer's assumption that Central Garden would have continued purchasing ant stakes from Copper Harbor was not clearly invalid given the evidence that Central Garden had long tabled its own automation plans and had been obtaining a desirable jelly product from Copper Harbor.

As Central Garden points out, "in calculating the net profit of a business all of the costs of producing the gross income should be deducted." (*Carrey v. Boyes Hot Springs Resort, Inc.* (1966) 245 Cal.App.2d 618, 622.) But Schwechheimer admitted he did not believe Walters deducted overhead costs from the projected profits. Nevertheless, even if it was error to allow this testimony, Central Garden fails to demonstrate prejudice. The amount of lost profits actually awarded by the jury for trade secrets misappropriation—$109,361—appears to have been based on the testimony of Central Garden's expert. Lewis testified that if Central Garden was liable for breach of contract and/or misappropriation of trade secrets, Copper Harbor's "potential 'lost profits' would be less than $109,361." Thus, the jury's award of lost profits appears to have derived from the opinion of Central Garden's own expert. And furthermore, the jury eventually deducted this same amount from the total award as duplicative of other recovery. Thus, we cannot say it is reasonably probable that Central Garden would obtain a more favorable damages award absent the claimed errors.

f. Failure to Deduct Additional Jelly Fill Costs

Central Garden argues the trial court abused its discretion in allowing Schwechheimer to give his unjust enrichment opinion without excluding the costs of the

additional jelly in Central Garden's automated process. Central Garden argues these costs substantially increased the manufacturing costs of each stake and should have been deducted in calculating Central Garden's unjust enrichment.

"A defendant's unjust enrichment is typically measured by the defendant's profits flowing from the misappropriation." (*Ajaxo Inc. v. E*Trade Financial Corp.* (2010) 187 Cal.App.4th 1295, 1305 (*Ajaxo*).) Under the Restatement Third of Unfair Competition, a trade secrets plaintiff "is entitled to recover the defendant's net profits. The plaintiff has the burden of establishing the defendant's sales; the defendant has the burden of establishing any portion of the sales not attributable to the trade secret and any expenses to be deducted in determining net profits. The rules governing the deductibility of expenses and the allocation of overhead are analogous to those stated in § 37, Comments g and h, on accountings in actions for trademark infringement." (Rest.3d Unfair Competition, § 45, com. f.) Under that section, "[t]he defendant may deduct the cost of labor and materials expended in producing the infringing goods." (*Id*., § 37, com. g.)

Schwechheimer provided the jury with alternative calculations for the costs of the additional jelly for the years 2015 through 2017. As we have discussed, based on the amount of the unjust enrichment award, it is highly likely the jury calculated its award using Schwechheimer's fill-only calculations for the years 2012 through 2016. Because the calculations for the additional jelly costs were contained in a different exhibit, it is also possible the jury did not deduct the additional jelly costs in calculating its final award.

In doing so, the jury may simply have concluded that Central Garden failed in its obligation to establish these expenses were properly deducted in calculating its unjust enrichment. (See Rest.3d Unfair Competition, § 45, com. f.) Central Garden's own damages expert conceded that "if the evidence indicates that the overfill was not due to the trade-secreted process, then I would not deduct it [from the unjust enrichment]." Along these lines, the jury was instructed to subtract Central Garden's "*reasonable*

expenses" from the value of Central Garden's benefit from the misappropriation, and thus, the jury may have concluded the jelly overfill costs were not reasonable expenses.

Substantial evidence supported this conclusion. The ant stakes produced by Copper Harbor from 2010 to 2011 and by Central Garden in Dallas beginning in 2012 were shown to be effective at killing ants. It was not until 2014, after the uptick in customer complaints, that the decision was made to add more jelly to the stakes, even though the field testing was "inconclusive." In other words, given the efficacy of the ant stakes initially produced using Copper Harbor's process, the passage of time before customer complaints arose, and the failure of Central Garden's testing to determine a problem in the ant stakes themselves, the jury could have concluded the additional jelly fill costs were not reasonable expenses related to the trade secret process that should be deducted from the unjust enrichment award. On this record, the trial court did not abuse its discretion in allowing Schwechheimer to give an unjust enrichment opinion that did not exclude the costs of the additional jelly.

D. The Packaging Agreement's Damages Limitation

Finally, we address Central Garden's contention that the trial court erred in denying its motion in limine to limit evidence of damages pursuant to paragraph 7(b) of the Packaging Agreement. This paragraph precluded awards of "incidental, indirect, special, consequential or punitive damages or losses (including without limitation lost profits . . .) incurred by or threatened against [Copper Harbor], regardless of legal theory," and capped "actual damages arising from this agreement" to the 12-month period preceding the event on which the claim was based.

Contractual clauses seeking to limit consequential damages must be strictly construed and any ambiguities resolved against the party seeking to invoke the limitation. (*Nunes Turfgrass v. Vaughn-Jacklin Seed Co.* (1988) 200 Cal.App.3d 1518, 1538.) Construed thusly, paragraph 7(b) does not apply to Copper Harbor's claim for breach of the NDA, which arose not out of the Packaging Agreement but a separate agreement. The NDA is identified in paragraph 11(b) of the Packaging Agreement as a "separate confidentiality agreement" that continues in force, and Central Garden points to no

language in paragraph 7(b) that purports to apply the damages limitation to claims for breach of this separate agreement. Central Garden does not contend the Packaging Agreement superseded the NDA, and any claim of supersession would be belied by paragraph 11(b), which, in stating that Copper Harbor's process is "continuously protected" by the NDA, reflects the parties' intent that the NDA remain in effect as a separate agreement. Although the damages cap under paragraph 7(b) would apply to a damages award for breach of the Packaging Agreement, the jury awarded no damages on that claim.

Nor does paragraph 7(b) apply to the unjust enrichment award on the trade secrets misappropriation claim. The CUTSA makes a clear statutory distinction between "damages for the actual loss caused by misappropriation" and "unjust enrichment caused by the misappropriation." (Civ. Code, § 3426.3, subd. (a); *Ajaxo, supra,* 187 Cal.App.4th at p. 1305 [unjust enrichment is typically measured by defendant's profits flowing from misappropriation].) Central Harbor's cost savings were not actual "damages or losses . . . incurred by or threatened against" Copper Harbor within the meaning of paragraph 7(b). (See *County of San Bernardino v. Walsh* (2007) 158 Cal.App.4th 533, 542–543 [unjust enrichment award available even where plaintiff has no corresponding loss for benefit received by defendant].) Thus, under a strict construction of paragraph 7(b), the provision did not bar an award corresponding to Central Garden's cost savings from its misappropriation of trade secrets.

In sum, the trial court did not err in refusing to apply the contractual damages limitation in paragraph 7(b) to the jury's damages awards.

E. Appeal From the Post-Judgment Cost Award

Central Garden argues that if the judgment is reversed on any or all of the above grounds, the cost award must be vacated, and entitlement to costs must be reevaluated after retrial. In light of our conclusions above, the post-judgment cost award is affirmed.

DISPOSITION

The judgment and post-judgment orders are affirmed. Copper Harbor shall recover its costs on appeal.

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Fujisaki, J.

WE CONCUR:

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Siggins, P. J.

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Petrou, J.

A149709; A150381